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What to Expect from the Wage and Hour Division in the Second Trump Administration

Paul DeCamp[±]

Epstein, Becker & Green, P.C.

Each time a new administration arrives in Washington, D.C., stakeholders wait with bated breath to find out what, if anything, will be different in the federal agencies, including the Wage and Hour Division (WHD) of the U.S. Department of Labor (the Department). This is especially so when the party in power changes. Now that we know the outcome of the 2024 federal elections, we can begin to prepare for likely shifts in regulatory priorities, enforcement practices, and overall approaches to achieving compliance. And because President-elect Trump previously served a term in office, a great deal of information is already available regarding how WHD is likely to function over the next four years.

[±] The opinions expressed in this paper are those of the author in his individual, personal capacity alone and do not necessarily reflect the views of his law firm, his colleagues, his firm's clients, or any other individual or entity.

I. Key Appointments

As we saw in the first Trump administration, the identity of the key appointments, most notably the secretary of labor, but also such figures as the deputy secretary, the solicitor of labor, and the administrator of WHD, can have an enormous impact on how the agencies function. In 2017, WHD got off to a fairly slow start due, at least in part, to a failed secretary nomination, followed by the confirmation of Secretary Alexander Acosta, whose approach to policy change was slow and cautious. Starting in July of 2019, however, when Patrick Pizzella became acting secretary, the pace of policy innovation increased rapidly. And once Eugene Scalia became secretary at the end of September 2019, the Department's rulemaking activities shifted into high gear and maintained that pace through the end of the term.

Thus, one of the first things to watch for is whom the president-elect selects for leadership roles at the Department, and especially the secretary and the WHD administrators. Informed by his experience during his first term in office and keenly aware that he has just four years to effect the key changes he wants to make—and that the time will fly by much faster than incoming administrations typically anticipate—President-elect Trump is likely to put in place a leadership team at the Department with a bias toward decisive action. In this respect, it seems likely that the Department will function more like it did during the second half of the president-elect's first term, rather than the first half.

II. Potential Regulatory Initiatives

Based on the priorities evident during the first Trump administration, as well as the actions taken during the Biden administration, several of which reversed or otherwise negated policies from the Trump years, the following topics may be candidates for rulemaking.

A. Independent Contractor Status

One of the signature regulations from the first Trump term was the final rule setting forth a standard for differentiating employees from independent contractors under the Fair Labor Standards Act (the FLSA).[1] Breaking new ground and seeking to instill a measure of predictability in what had for decades been an amorphous multi-

[1] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021) (rescinded 2024).

factor "facts and circumstances" analysis, the rule singled out two core factors: the nature and degree of the individual's control over the work and the individual's opportunity for profit or loss. If both factors point in the same direction, that result would ordinarily determine the worker's status. The rule also identified three other factors—the amount of skill required for the work, the degree of permanence of the working relationship, and whether the work is part of an integrated unit of production—that, while less probative than the core factors, may also bear on the analysis in close cases.

This regulation did not take effect before President Biden took office; the new administration quickly moved to delay its effective date and then issued a final rule withdrawing the Trump-era independent contractor regulation.[2] In March of 2022, the Eastern District of Texas determined that delaying the effective date and ultimately withdrawing the Trump-era rule violated the Administrative Procedure Act (the APA) because the comment period was too short and the Department failed to consider alternatives beyond merely withdrawing the regulation.[3] The Department appealed the ruling to the Fifth Circuit and then obtained a stay pending further rulemaking. The Department issued a new independent contractor rule, which went into effect in March of 2024.[4] The appeal remained stayed until February of 2024, when the Fifth Circuit lifted the stay and vacated the district court's order as moot in light of the new rulemaking. However, the court also remanded the matter to the district court to allow the plaintiffs to file an amended complaint challenging the current regulation.[5] That litigation is proceeding in the district court.

Given this history, it would not be surprising to see the Department rescind the Biden-era independent contractor rule and replace it with a rule that may be identical, or at least very similar, to the version issued during the first Trump term.

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[2] Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 Fed. Reg. 24,303 (May 6, 2021) (codified at 29 C.F.R. pts. 780, 788, 795).

[3] *See* Coalition for Workforce Innovation v. Walsh, No. 1:21-CV-130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022).

[4] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (Jan. 10, 2024) (codified at 29 C.F.R. pts. 780, 788, 795).

[5] *See* Order, Coalition for Workforce Innovation v. Su, No. 22-40316 (5th Cir. Feb. 19, 2024).

B. Joint Employment

Another significant rulemaking from the first Trump term involved joint employer status under the FLSA. Issued in January of 2020, the joint employer rule provided, among other things, that actual control, as opposed to merely contractually reserved or potential control, was the focus of the analysis.[6] In September 2020, the Southern District of New York ruled that most of the regulation is invalid under the APA. The Department appealed, but once in office the Biden administration sought to delay the appeal pending further rulemaking. After the Department issued a revised final rule in July of 2021 rescinding the Trump-era rule,[7] the Second Circuit dismissed the appeal and vacated the district court's order as moot.[8]

As with the independent contractor rule, we may see the return of the Trump-era standard, or something similar to it, perhaps modified to address some of the concerns expressed by the Southern District of New York.

C. Salary Requirements for the Executive, Administrative, and Professional Exemptions

On April 26, 2024, WHD published a final rule raising the minimum salary for the FLSA's minimum wage and overtime exemptions for executive, administrative, and professional employees from $684 per week ($35,568 per year) to $844 per week ($43,888 per year), and increasing the minimum total compensation for highly compensated employees from $107,432 per year to $132,964 per year, effective July 1, 2024. The rule includes an additional stage of increases scheduled for January 1, 2025, which will raise the minimum salary to $1,128 per week ($58,656 per year) and the compensation threshold for highly compensated employees to $151,164 per year. The

[6] Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2,820 (Jan. 16, 2020) (rescinded 2021).

[7] Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 Fed. Reg. 40,939 (July 30, 2021) (codified at 29 C.F.R. pt. 791).

[8] *See* Order, New York v. Walsh, No. 20-3806 (2d Cir. Oct. 29, 2021).

rule also provides for automatic triennial updating without further notice-and-comment rulemaking.[9]

This regulation, like the comparable rule issued by the Obama administration in 2016, drew challenges in court. And like the 2016 version of the rule, the Eastern District of Texas held that the rule is invalid under the APA.[10] In a sixty-two-page ruling issued on November 15, 2024, the court concluded that the 2024 regulation unreasonably excludes from exemption a large percentage of workers whose duties meet the standards for exempt status, and also that neither the FLSA nor the APA allows for automatic updating without further rulemaking.

The Department has appealed this ruling, though the Trump administration may elect to abandon the appeal or else to seek a stay pending further rulemaking.

D. Tipped Employees

Another example of regulatory pendulum swinging occurred when the Department imposed limits on the amount of supposedly "non-tipped duties" workers may perform while receiving a tipped wage below the minimum wage. WHD asserted a subregulatory "80/20 Rule" via the agency's Field Operations Handbook in 1988 purporting to make the tip credit unavailable if an employee spends more than 20% of the workweek engaging in tasks that do not directly and immediately generate tips, and also for any time spent on activities supposedly unrelated to pursuing tips. After several policy changes with different administrations, the Trump administration issued a final rule in late 2020 that would have significantly altered the Department's approach, generally rejecting time limits on non-tipped duties.[11] That rule was set to have an effective date of March 1, 2021, after the change-over in administrations.

The incoming Biden administration delayed and then withdrew the key provisions of the Trump-era tipped employee rule, replacing it with a final rule in October 2021 that codified the 80/20 principle and added a further limitation barring use of the tip

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[9] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and computer Employees, 89 Fed. Reg. 32,842 (Apr. 26, 2024) (to be codified at 29 C.F.R. pt. 541).

[10] Order, Tex. v. Dep't of Lab., No. 4:24-CV-499 (E.D. Tex. Nov. 15, 2024).

[11] Tip Regulations Under the Fair Labor Standards Act (FLSA), 85 Fed. Reg. 86,756 (Dec. 30, 2020).

credit after thirty consecutive minutes of not actively pursuing tips.[12] The Biden-era rule faced a challenge in the Eastern District of Texas. After two appeals, the Fifth Circuit concluded in August of 2024 that the Biden-era rule is invalid under the APA and ordered the vacatur of the rule.[13]

In light of the Fifth Circuit's decision, it seems unlikely that the Trump administration will try to regulate on this topic. The main reason it did so the last time around was to nullify the 80/20 concept, which is the same end result as obtained in the Fifth Circuit. But it is possible that WHD may at least modify its subregulatory guidance to reflect the elimination of the 80/20 rule and the thirty-minute standard from the Biden-era regulation. If the Biden administration files a certiorari petition challenging the Fifth Circuit's decision, which seems unlikely, particularly in light of the Department's recent issuance of a clean-up rule designed to eliminate the vacated provisions from the Code of Federal Regulations, the Trump administration would probably abandon that challenge. However, this could change if the Trump administration has an interest in having the Supreme Court resolve the indirect circuit split created by the Fifth Circuit's ruling. This split involves three other circuits that had upheld the subregulatory version of the 80/20 Rule, albeit under a pre-*Loper Bright* analytic framework.[14]

E. Minimum Wage for Federal Contractors

In April of 2021, President Biden issued Executive Order 14026, directing federal agencies to require a minimum wage of $15 per hour for work performed on covered federal contracts beginning on January 30, 2022, with inflationary adjustments thereafter. The executive order also phased out the tip credit for work on federal contracts by January 1, 2024. The Department issued its regulation implementing this order in November of 2021.[15] Although the District of Arizona upheld the regulation, in November 2024 a divided panel of the Ninth Circuit concluded that the executive order and the implementing regulation exceeded the president's authority under the

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[12] Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60,114 (Oct. 29, 2021).

[13] Rest. L. Ctr. v. Dep't of Lab., 120 F.4th 163 (5th Cir. 2024).

[14] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[15] Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126 (Nov. 24, 2021) (codified at 29 C.F.R. pts. 10 & 23).

Federal Property and Administrative Services Act (commonly referred to as the Procurement Act).[16]

It remains to be seen whether the Department will seek rehearing en banc or Supreme Court review. But one can anticipate that the Department may, in the new administration, abandon any challenges to the Ninth Circuit's ruling. President-elect Trump may also rescind the executive order.

F. Nondisplacement of Qualified Workers Under Service Contracts

In November of 2021, President Biden issued Executive Order 14055, calling for a general requirement that workers on covered federal contracts have a right of first refusal to continue in their work in the event that a new contractor assumes the contract on which they have been working. The Department issued a final rule implementing this executive order in December of 2023.[17] The original nondisplacement executive order, number 13495, dates back to January of 2009 and was one of the first actions of the Obama administration. President-elect Trump revoked that order in October of 2019 via Executive Order 13897. President Biden's Executive Order 14055, in turn, revoked President-elect Trump's Executive Order 13897.

This history strongly suggests that we will see a new executive order revoking executive order 14055, and thus a new regulation rescinding the Biden-era rule.

G. Updating Davis-Bacon and Related Acts Regulations

In August of 2023, the Department issued a final rule updating and expanding what had been widely regarded as underdeveloped regulations under the Davis-Bacon Act and related acts.[18] The most prominent and controversial of these updates involved discarding the standard that WHD had used since 1983 for determining the prevailing wage for federally funded construction projects in a locale. The post-1983 standard required that at least 50% of the workers in a classification receive that wage, but the new rule favors the 30% standard that WHD used from 1935 to 1983.

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[16] Nebraska v. Su, No. 23-15179, 2024 WL 4675411 (9th Cir. Nov. 5, 2024).

[17] Nondisplacement of Qualified Workers Under Service Contracts, 88 Fed. Reg. 86,736 (Dec. 14, 2023) (codified at 29 C.F.R. pt. 9).

[18] Updating the Davis-Bacon and Related Acts Regulations, 88 Fed. Reg. 57,526 (Aug. 23, 2023) (codified at 29 C.F.R. pts. 1, 3, 5).

Depending on the level of interest expressed by the construction industry, the Department may find itself revisiting this rulemaking in the new administration.

III. Pre-Litigation Liquidated Damages

As those familiar with the FLSA understand, the statute authorizes plaintiffs to recover an additional amount up to the amount of the back pay award, referred to as liquidated damages. From the first days of the FLSA in the late 1930s through the presidency of George W. Bush, the Department treated liquidated damages as a remedy available only in litigation. WHD historically did not request payment of liquidated damages, whether at 100% of back wages or in any other amount, unless and until the filing of a complaint in federal court. Until that point, while a matter remained in the administrative phase, the Department would normally resolve investigations by obtaining back pay and a commitment to future compliance.

During the Obama administration, the Department for the first time began insisting on liquidated damages as a condition for settling an investigation pre-suit. By around 2011 or 2012, investigators routinely demanded liquidated damages at the investigation stage.

In June of 2020, Deputy Secretary of Labor Patrick Pizzella restored, for the most part, the status quo ante, issuing a memorandum to the WHD administrator and the solicitor of labor applying Executive Order 13294 to liquidated damages and significantly restricting the range of matters in which the Department may seek pre-litigation liquidated damages.[19] Under this memorandum, WHD would not seek liquidated damages at the administrative stage if, inter alia, "there is not clear evidence of bad faith and willfulness" or "the employer has no previous history of violations[.]" WHD Administrator Cheryl Stanton thereafter issued Field Assistance Bulletin No. 2020-2 communicating the revised standards to field personnel.[20]

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[19] U.S. Dep't of Labor, Wage & Hour Div., Practice of Seeking Liquidated Damages in Settlements in Lieu of Litigation, Field Assistance Bulletin No. 2020-2 (June 24, 2020), https://www.employmentlawinsights.com/wp-content/uploads/sites/36/2020/07/Sup-Materials.Blog_.FSP_.-FIELD-ASSISTANCE-BULLETIN-No.-2020-2.-MMiller-AYuengert.-July-2020.pdf.

[20] *Id.*

In April of 2021, WHD's then-principal deputy administrator (and future administrator) Jessica Looman announced the rescission of the June 2020 memorandum. She issued a new Field Assistance Bulletin, No. 2021-2, which stated that "WHD will return to pursuing liquidated damages from employers found due in its pre litigation investigations provided that the Regional Solicitor (RSOL) or designee concurs with the liquidated damages request."[21]

Based on past events, it seems likely that the Department will quickly pivot on liquidated damages and return to the rule of limited to no pre-suit liquidated damages.

IV. Child Labor Enforcement

The Department has issued extensive regulations addressing child labor. Specifically, there are two bodies of generally applicable standards, one identifying and proscribing hazardous occupations that workers aged sixteen and seventeen may not engage in, and another addressing the occupations that workers aged fourteen and fifteen may engage in as well as the hours when they may do so. There are also regulations addressing child labor in agriculture. The main factual point triggering coverage of these standards is the age of the worker.

Historically, employers have relied on the age documentation provided by workers at the time of hire. For workers who do not have a driver's license or who are still in high school, the documentation would often involve a work permit or other paperwork issued by a local school authority. WHD had little or no occasion to conclude that minors obtained employment through misrepresenting their age; and if that were to happen, the employer would generally not face penalties in the absence of meaningful culpability, such as accepting clearly fake age documents or otherwise knowingly hiring an under-age worker.

In recent years, however, with the rapid growth in the number of undocumented individuals in the country, a new challenge has emerged: undocumented minors presenting fraudulent identification papers claiming to be adults. These are not merely obvious fake "McLovin"-style identification credentials.[22] Instead, workers are

[21] U.S. Dep't of Labor, Wage & Hour Div., Practice of Seeking Liquidated Damages in Settlements in Lieu of Litigation, Field Assistance Bulletin No. 2021-2 (Apr. 9, 2021), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2021_2.pdf.

[22] SUPERBAD (Columbia Pictures 2007).

obtaining, often in conjunction with sophisticated labor trafficking networks that engage in identity theft and other crimes, identification papers sufficient to fool even the most diligent HR personnel and to clear the federal E-Verify system. As a result, large numbers of minors are, for the first time, obtaining through fraudulent means jobs that the federal child labor regulations prohibit them from holding.

During the Biden administration, WHD has taken a very aggressive approach toward employers in this situation, often conducting surveillance, obtaining search warrants, executing midnight raids, and publicly shaming companies that happen to have minors working in prohibited occupations, without regard for whether the employers have themselves been the victim of fraud by virtue of the phony identification documents. The Department has filed complaints in court seeking disgorgement of profits and other remedies that go far beyond the civil money penalty regime specified in the FLSA, again with little or no regard for whether the employers actually did anything blameworthy. In short, the Department has in recent years treated child labor violations as a matter of strict liability.

This approach creates a real dilemma for employers. Under federal immigration law, it is a violation for an employer not to credit worker identification documents that appear on their face to be valid. Insisting on documentation beyond what the Form I-9 specifies can constitute so-called document abuse and subject an employer to penalties. And imposing more demanding documentation standards for workers who appear to be foreign-born may give rise to various discrimination claims under federal and state law.

The incoming Trump administration is likely to address this problem. They may issue regulations or guidance to limit civil penalties in child labor cases to situations where the employer knew or should have known the worker was underage. Additionally, they may treat good-faith reliance on valid identification documents as a defense against penalties.

V. Civil Money Penalties

Beyond just the child labor context, WHD has in recent years widened the aperture for situations that qualify a violation for civil money penalties as "repeated[] or willful[]" under FLSA section 16(e)(2).[23] Under WHD's current view, an employer that ten years ago misclassified a single employee as exempt in Maine, leading to an

[23] 29 U.S.C. § 216(e)(2).

underpayment of overtime, engages in a "repeat" violation if today the same employer fails to treat an interrupted meal break of a different worker in Hawaii as compensable, leading to a minimum wage violation. In WHD's view, the employer in this scenario is penalty-eligible, with the amount to be determined based on all the facts. Although this specific scenario is not likely to result in a large penalty assessment, the real challenge for employers is the leverage that the threat of penalties can bring, especially where the current violation or alleged violation involves a significant number of workers.

The new administration may choose to establish clearer standards for what qualifies as a repeat violation, and in particular clarifying that older, dissimilar violations will not render current violations "repeated."

VI. Opinion Letters

Since the 1940s, and as recently as the George W. Bush administration, the WHD under both parties typically issued numerous opinion letters each year under the FLSA, as well as occasional opinion letters under other statutes such as the Family and Medical Leave Act, the Consumer Credit Protection Act, and the Migrant and Seasonal Agricultural Worker Protection Act. These guidance documents usually addressed discrete factual scenarios and novel legal questions residing in the interstices of the provisions of the Code of Federal Regulations, and they were sometimes tremendously helpful if the specific issue presented happened to align with an issue facing an employer or worker.

Some workers' advocates have criticized opinion letters as affording employers a "get out of jail free" card because of the FLSA's defense for good-faith reliance on a written determination by the WHD administrator. They also point to the ex parte nature of the opinion letter process, as well as the potential for opinion letters to affect pending litigation matters. But historically, the opinion letters seem to favor the worker about as often as they favor the employer, suggesting that the process does not skew in favor of one set of stakeholders over another.

Early in the Obama administration, WHD pivoted from that approach, rejecting opinion letters in favor of Administrator Interpretations, which the Department then viewed as a more efficient and effective vehicle for making broader pronouncements of policy applicable to a wider swath of workers across a range of industries. As a result, WHD issued no opinion letters from January 17, 2009, until January 5, 2018.

In the first Trump administration, WHD returned to issuing opinion letters, releasing thirty-two letters in 2018, seventeen in 2019, twenty-one in 2020, and nine

in January of 2021. The Biden administration, by contrast, has issued almost no opinion letters, publishing two in early 2023 interpreting the FMLA, along with two more—one under the FMLA and the other under the FLSA—on November 8, 2024.

It seems likely that the second Trump administration will see a return to the practice of issuing opinion letters.

VII. Payroll Audit Independent Determination Program

Ever since the Supreme Court's decision in *Brooklyn Savings Bank v. O'Neil*,[24] doubts have existed regarding the enforceability of private FLSA releases not supervised by a court or the Department. While courts have disagreed regarding the circumstances when a private release may be enforceable—with some courts leaving room for binding releases where there is a good-faith dispute regarding liability or damages and all parties have counsel, while other courts categorically reject such releases—employers seeking to resolve FLSA claims with finality have sought help.

For many decades, WHD stood ready to supervise back wage payments if an employer self-reported a violation and offered to remedy the situation and to come into compliance. During the Obama years, WHD abandoned that historical approach, refusing to supervise such back wage payments unless WHD conducted its own full investigation. As a result, employers generally concluded that self-reporting was not in their best interest because a full investigation by WHD often uncovers issues and exposure beyond the matter the employer originally intends to bring to the Department's attention.

During the first Trump administration, WHD rolled out a revised version of its past practices for supervising back wage payments. Known as the Payroll Audit Independent Determination program, or PAID, WHD provided relatively narrow releases tailored to the specific issues and time periods presented by the employer, thereby addressing one of the main criticisms of these supervised payments, i.e., the provision of a blanket release that eliminates claims for which workers arguably receive no remedy.

[24] Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945).

The Biden administration discontinued the PAID program promptly upon taking office.[25]

The new Trump administration is likely to return to the practice of supervising back wage payments for employers who self-report violations and agree to future compliance. Whether that practice formally revives PAID or takes some other approach remains to be seen, but there will probably be a willingness to reopen a pathway for facilitating and encouraging self-reporting and prompt back wage payments, along with an appropriately tailored release.

VIII. Conclusion

Will the Department during the second Trump administration function more like the Department during the early part of the first Trump administration, or like the Department in the latter stage of that administration, or in ways that differ significantly from both? Will organized labor find a more receptive audience among the Department's political leadership than during the previous Trump administration? Will the Department's policy initiatives hew more toward protecting the interests of businesses, or instead focus on improving working conditions for employees? Many questions remain unanswered during this time of change, but we should all watch closely as 2025 unfolds.

[25] U.S. Dep't of Lab., Press Release No. 21-142-NAT, US Department of Labor Ends Program That Allowed Employers to Self-Report Federal Minimum Wage and Overtime Violations (Jan. 29, 2021), https://www.dol.gov/newsroom/releases/whd/whd20210129.

Paul DeCamp is a Member of Epstein, Becker & Green's Employment, Labor & Workforce Management practice in Washington, D.C. where he co-chairs the firm's national Wage and Hour practice group. A former Administrator of the U.S. Department of Labor's Wage and Hour Division, he has almost three decades of experience representing employers and trade associations in the most complex and challenging wage and hour litigations, government investigations, and counseling matters. His work spans a broad range of industries, including aerospace, financial services, gaming, health care, hospitality, manufacturing, restaurants, retail, and transportation, as well as many others.

Paul is a speaker at Practising Law Institute's Wage & Hour Litigation and Compliance 2025 (January 27, 2025) and Understanding Employment Law 2025 (March 3, 2025) programs.